Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

CONTINENTAL INSURANCE COMPANY,
Petitioner,

v.

VIAD CORP AND ALLIANZ INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 26, 2003

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QUESTION PRESENTED

Under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, in a dispute arising from an agreement with an arbitration clause, who must determine the legal effect of a federal court judgment ending an earlier dispute between the parties – an arbitration panel, or the federal court that issued the judgment?

PARTIES TO THE PROCEEDING

The parties to this proceeding in the United States Court of Appeals for the Second Circuit are the same as the parties to this proceeding: Petitioner Continental Insurance Company* and Respondents Viad Corp and Allianz Insurance Company.

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* Pursuant to Supreme Court Rule 29(6), Continental Insurance Company discloses that it is a wholly owned subsidiary of CNA Financial Corporation. More than 10% of CNA's stock is owned by Loews Corporation, a publicly held company.

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No. ____

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VIAD CORP AND ALLIANZ INSURANCE COMPANY,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Continental Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is unpublished but is reported as *Continental Insurance Company v. Allianz Insurance Company and Viad Corp*, No. 02-7438, 2002 U.S. App. LEXIS 25879 (2d Cir. Dec. 16, 2002), and is reprinted in the Appendix ("App.") at 1-5.

The court of appeals affirmed the district court's decision denying summary judgment to Continental Insurance Company and granting a motion to compel arbitration by Viad Corp and Allianz Insurance Company, which is unpublished but is reported as *Continental Insurance Company v. Allianz Insurance Company and Viad Corp*, No. 00 Civ. 4548, 2001 U.S. Dist. LEXIS 3191 (S.D.N.Y. Mar. 23, 2001), and is reprinted at App. 6-17.

The district court's original 1984 consent judgment in an earlier litigation between the parties, styled *The Continental Insurance Company v. The Greyhound Corporation*, 1984 Civil Action No. 1056 (ADS) (S.D.N.Y. Mar. 14, 1984), is reprinted at App. 18-21.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Second Circuit entered its judgment and opinion on December 16, 2002. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED IN THIS CASE

9 U.S.C. § 2 provides:

> *Validity, irrevocability, and enforcement of agreements to arbitrate.* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3 provides:

Stay of proceedings where issue therein referable to arbitration. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 13 provides:

Papers filed with order on motions; judgment; docketing; force and effect; enforcement. The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the

entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.
(b) The award.
(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

28 U.S.C. § 1651(a) provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

This case is about the enforceability of federal court judgments – who enforces them and whether parties that enter into "so ordered" settlement agreements can count on them to be enforced at all.

Variations of the fact pattern in this case will be recurrent. Nearly twenty years ago, the parties in this case – Continental Insurance Company and Viad Corp, then known as the Greyhound Corporation – settled federal district court litigation arising from a contract with an arbitration clause. The parties' settlement agreement was "so ordered" by a federal district judge.

Fifteen years passed. Then Viad contacted Continental, seeking monies it claimed were owed under the contract. Continental responded that the "so ordered" settlement agreement released it from all claims under the contract. When Viad persisted, Continental returned to the district court that had "so ordered" the settlement agreement and asked the court to enforce its prior judgment by enjoining Viad's attempt to collect under the contract. Viad argued that because the contract contained an arbitration clause, the dispute should be referred to arbitration.

The district court, then, was presented squarely with the question: Must it decide whether the "so ordered" settlement agreement disposed of Viad's claims, or must it let an arbitration panel decide?

The district court sent the matter to arbitration, and the Second Circuit affirmed that decision.

Continental now asks this Court to decide whether the district court must determine what its own judgments mean, or whether the district court must abdicate its responsibility for interpreting and enforcing its prior judgments to an arbitration panel, as the Second Circuit held.

The opinions of the district court and the Second Circuit describe the facts of this case in detail. In 1975, Continental and Greyhound (Viad's predecessor) entered into a Reinsurance and Assumption Agreement (the "R&A Agreement"), under which Continental assumed all insurance and reinsurance risks written by the General Fire & Casualty Company ("General Fire"), a wholly-owned subsidiary of Greyhound. (App. 2). The R&A Agreement contained an arbitration clause requiring the parties to refer to an arbitration panel "differences hereafter arising between the parties hereto with reference to any and all transactions or terms and conditions under this contract." (App. 2).

Shortly thereafter, Greyhound sold the shell of General Fire (essentially the corporate structure and licenses) to Allianz Insurance Company. Greyhound agreed to indemnify Allianz for any claims made against it arising from General Fire's insurance business, which had been assumed by Continental. (App. 7).

In 1983, a dispute arose over the amount owed by Greyhound to Continental under the R&A

Agreement. Continental demanded arbitration, and an arbitration panel awarded Continental the sum of $5,340,250. (App. 7-8). Greyhound failed to pay the award, so Continental brought an action to confirm the award in the U.S. District Court for the Southern District of New York, pursuant to 9 U.S.C. § 9. (App. 2).

The parties agreed to settle the case with a "so ordered" settlement agreement. On March 15, 1984, U.S. District Judge Abraham Sofaer "so ordered" a Stipulation and Order (App. 18-21) providing that Greyhound would pay Continental $5,340,250 in full satisfaction of all claims against Greyhound. (App. 8). The Stipulation and Order also directed the parties to exchange mutual releases that "shall provide for the release of any and all claims . . . arising directly or indirectly out of the Agreement or the Award, whether or not such claims were actually asserted in the arbitration proceeding resulting in the Award." (App. 19). Nine days later, Greyhound paid Continental, and the mutual releases were exchanged. (App. 3).

The parties had no dealings with each other until the mid to late 1990s. (App. 3). Then several General Fire policyholders sued Allianz in insurance coverage actions arising from General Fire policies. Allianz tendered the defense of these claims to Continental, relying on the R&A Agreement. (App. 3).

Continental maintained that the Stipulation and Order and the releases exchanged pursuant to it freed Continental from all claims arising under the

R&A Agreement. On June 20, 2000, therefore, Continental returned to the Southern District of New York and asked the court to enforce its 1984 judgment by means of declaratory and injunctive relief. (App. 3). Allianz and Viad (by this time, Greyhound's new corporate name) moved to stay the action and compel arbitration pursuant to 9 U.S.C. § 3. The district court granted that motion, holding that the R&A Agreement's "arbitration clause requires that the effect of the 1984 Releases" commanded by the Stipulation and Order "must be decided by an arbitrator." (App. 17). Continental appealed.[1]

The Second Circuit affirmed. The Second Circuit held that because the mutual releases commanded by the "so-ordered" settlement agreement contained "no express rescission of the arbitration agreement," the question of Continental's liability under the R&A Agreement must be decided by an arbitration panel "even if, as Continental contends, the 1984 Releases cancelled the R&A Agreement." (App. 4). The Second Circuit stated: "Absent an explicit intent to rescind, as the district court noted, the arbitration clause survived any termination of the R&A Agreement." (App. 4).

Essentially, the Second Circuit held that even though the district court had ordered "the release of any and all claims . . . against Continental . . . arising directly or indirectly out of the Agreement or

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[1] Prior to Continental's appeal, an arbitration panel ruled in favor of Viad and Allianz, and the parties stipulated to confirmation of the award.

the Award," (App. 19), the effect of that order on Continental's present liability could be determined only by an arbitration panel – not the court that issued the order – because the order did not expressly terminate the arbitration clause. (App. 4-5). This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

In the case of *In re Y&A Securities Litigation*, 38 F.3d 380 (8th Cir. 1994), the Eighth Circuit rejected an arbitration "panel's interpretation of [a] settlement agreement incorporated in the district court's final judgment. The district court, and not the arbitration panel, is the best interpreter of its own judgment." *Id.* at 383.

In the instant case, however, the Second Circuit reached precisely the opposite conclusion. The Second Circuit held that an arbitration panel, rather than the district court, should properly decide the preclusive effect of the district court's prior judgment – the "so ordered" settlement agreement. That holding is consistent with other Second Circuit decisions and the law of the Ninth Circuit, but is in direct conflict with the law of the Third, Fourth, Eighth, and Eleventh Circuits.

Thus, the circuits are split on an important question of federal law under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*[2] This Court

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[2] The question of whether a dispute is arbitrable under the Federal Arbitration Act is a question of

should hear this case to resolve the circuit split. This Court's intervention is especially necessary because the view adopted by the Second Circuit – which hears more arbitration-related cases than any other circuit – undermines the policy objectives of the Federal Arbitration Act.

I. The Second Circuit's Decision Directly Conflicts with Decisions of the Third, Fourth, Eighth, and Eleventh Circuits.

When a settlement agreement is "so ordered" by a federal district judge, the agreement becomes a judgment of the court, which the court retains jurisdiction to enforce. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994); *see also Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366, 370 n.* (2002) (stating that a district court may enforce a court-approved settlement agreement by injunction). Similarly, a confirmed arbitration award is indistinguishable from any other federal court judgment. *See* 9 U.S.C. § 13. All federal judgments are entitled to preclusive effect.

The circuits are split, however, on the question of who determines the preclusive effect of a prior federal judgment – whether a confirmed arbitration award, a so-ordered settlement agreement, or a litigated judgment – over a new dispute arising from a contract with a valid arbitration clause. In this case, the Second Circuit reiterated its view that an

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federal law. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 626 (1985).

arbitration panel should decide what the prior judgment means and whether the prior judgment precludes the claims being arbitrated. That position has its origins in *United States Fire Insurance Co. v. National Gypsum Co.*, 101 F.3d 813 (2d Cir. 1996), in which the Second Circuit held that the preclusive effect "of the district court's prior decision must itself be arbitrated." *Id.* at 816. *National Gypsum* in turn applied the rationale of *National Union Fire Insurance Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135-36 (2d Cir. 1996), which held that a preclusion defense based on a confirmed arbitration award is arbitrable under the Federal Arbitration Act.

The Second Circuit's rule is directly contrary to the Third Circuit's holding in *John Hancock Mutual Life Insurance Co. v. Olick*, 151 F.3d 132 (3d Cir. 1998). In *Olick*, the Third Circuit held that

> *when a federal court is presented with the contention that a prior federal judgment determined issues now sought to be relitigated in an arbitral forum it must first determine the effect of the judgment.* This is so whether the question arises in an action to compel arbitration or as here, in an action to enforce a disputed award. The federal policy favoring forum selection clauses, based in part on the institutional interest of federal courts in avoiding litigation, does not come into play until the court first determines whether prior

> completed litigation has already finally determined all issues.

Id. at 138 (emphasis supplied) (citing *Tel. Workers Union of N.J. v. N.J. Bell Tel. Co.*, 584 F.2d 31, 32-33 (3d Cir. 1978).

The Fourth, Eighth, and Eleventh Circuits also disagree with the Second Circuit rule embodied by the instant case. *See In re Am. Honda Motor Co.*, 315 F.3d 417, 438 (4th Cir. 2003) (affirming district court's enforcement of a court-approved settlement agreement by enjoining enforcement of an arbitration award that violated settlement agreement); *Y&A*, 38 F.3d at 382 ("No matter what, courts have the power to defend their judgments . . . including the power to enjoin or stay subsequent arbitrations."); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir. 1993) ("Courts should not have to stand by while parties re-assert claims [in arbitration] that have already been resolved.").[3]

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[3] The Fifth Circuit has held that a federal court, rather than an arbitration panel, should determine and enforce the preclusive effect of *another* court's judgment. *See Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 499 (5th Cir. 1986). Although *Miller Brewing Co.* did not involve a federal court enforcing its *own* judgment, the rationale of *Miller Brewing Co.* supports the rule adopted by the Third, Fourth, Eighth, and Eleventh Circuits. (*Olick*, *Y&A*, and *Kelly* all cite and follow *Miller Brewing Co.*) It is clear that district courts in

Only one other circuit appears to embrace the Second Circuit rule. In *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126 (9th Cir. 2000), a case involving the preclusive effect of a confirmed arbitration award, the Ninth Circuit held that "we agree with the Second Circuit that a res judicata defense is a 'component' of the merits of a dispute and is thus an arbitrable issue." *Id.* at 1134. In so doing, the Ninth Circuit criticized the Eighth Circuit's decision in *Y&A* and the Eleventh Circuit's

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the Fifth Circuit would enforce their own judgments against subsequent efforts to arbitrate. *See id.* at 497 n.3 ("[T]o allow arbitration on top of protracted litigation in this case would be to add insult to injury. The doctrine of res judicata . . . and its cousin collateral estoppel have probably done more to prevent useless and wasteful litigation than arbitration ever could.").

The Supreme Court of Alabama, in the context of a state court enforcing its own judgment, has followed the Third, Fourth, Fifth, Eighth, and Eleventh Circuits and held that the preclusive effect of a court judgment should be decided by the court rather than an arbitration panel. *See Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 821 So. 2d 158, 164 (Ala. 2001).

The Seventh Circuit, without deciding the question, has noted the split in authorities. *See Miller v. Runyon*, 77 F.3d 189, 193-94 (7th Cir. 1996).

decision in *Kelly* on the basis that those decisions did not "take into consideration the FAA's policy limiting the role of the court once arbitrability is determined." *Id.* Although *Chiron* involved a confirmed arbitration award rather than a litigated or consent judgment, the Ninth Circuit's broad holding and its criticism of the Eighth Circuit's decision in *Y&A* and the Eleventh Circuit's decision in *Kelly* suggest strongly that it would adhere to the Second Circuit rule in cases of litigated or consent judgments as well as confirmed arbitration awards.

In sum, the question presented is ripe for review. It has been considered thoroughly by seven of the thirteen circuits in the last twenty-five years, and the conflicting decisions require resolution by this Court.

II. The Question Presented Is Important Because the Second Circuit Decision Undermines the Purpose of the Federal Arbitration Act By Rendering Finality Impossible.

Federal policy, as embodied by the Federal Arbitration Act, strongly favors arbitration as an alternative dispute resolution process. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480-81 (1989). Parties negotiating commercial contracts choose to include arbitration clauses so that they can arbitrate rather than litigate their disputes. Arbitration is less expensive than litigation and frees up scarce judicial resources. *See Y&A*, 38 F.3d at 382.

Parties' willingness to agree to arbitration clauses, however, depends on their security that arbitration can produce finality. The Second Circuit rule makes finality impossible. Under the Second Circuit's holding, a judgment – whether a confirmed arbitration award, a litigated judgment, or, as in this case, a "so ordered" settlement agreement – can never be given preclusive effect by a court, even the court that issued the judgment.

The result, as the instant case illustrates, is an endless series of arbitrations and ensuing litigations. A matter that was arbitrated, litigated, and settled by consent judgment 16 years earlier can be reopened by one of the parties, and the court is powerless to enforce its own judgment. Instead, the parties must march off again to arbitration. In this case, this pattern could foreseeably repeat itself again and again, with Continental demanding arbitration 16 years from now and Viad demanding arbitration 16 years after that. Faced with such uncertainty, parties will shy away from agreeing to arbitrate their disputes. The ultimate result will be damaging to the congressional intent behind the Federal Arbitration Act and further clog the federal court system. As the Eighth Circuit aptly noted, this result "turns the purpose of the FAA on its head." *Y&A*, 38 F.3d at 382.

Parties to commercial litigation need finality. The Second Circuit's rule makes finality impossible. Continental believed that the 1984 so-ordered settlement agreement resolved its dispute with Viad

and Allianz with finality. The Second Circuit's rule, however, sent the matter back to arbitration, rekindling an uncertainty that has extended for more than two years since the district court declined to interpret and enforce its own prior judgment that purported to conclusively end the controversy. Now, in light of the Second Circuit's holding, *Viad and Allianz* likely believe their dispute with Continental has been resolved with finality – that Continental, not them, will be responsible for future claims against old General Fire policies. But the Second Circuit rule also denies *them* finality, because if Continental disputes its responsibility decades down the road, the result can only be another arbitration – one to determine *both* the effect of the 1984 so-ordered settlement agreement *and* the 2002 confirmed arbitration award. For sophisticated corporations, this haze is untenable.

Ultimately, federal courts have the duty to enforce their own judgments. Every federal court judgment has meaning, and the federal court that issues the judgment must decide what the judgment means. No decision maker is better qualified to determine what a judgment means than the court that issued it – certainly not arbitrators, who often are chosen because of their expertise in a particular field (reinsurance, for example) but who may not even be lawyers.

When parties enter into a so-ordered settlement agreement rather than simply a private settlement agreement, the parties signify that they intend the so-ordering court to have jurisdiction to interpret

and enforce the settlement agreement. Otherwise, the court's action in retaining jurisdiction to enforce the settlement agreement is pointless.

The Second Circuit has adopted the minority view on this question. As a practical matter, however, the Second Circuit's position on this question is perhaps most important. More arbitration-related questions are decided there than in any other circuit, because the financial markets are located in New York, and vast numbers of arbitrations arise from securities transactions and other finance-related commercial disputes. When the circuit most critical to achieving the objectives of the Federal Arbitration Act has adopted a rule contrary to those objectives, and contrary to the holdings of four other circuits, this Court's consideration of the issue is crucial.

III. The Second Circuit Decision Is Erroneous.

Because it denies the ability of a federal court to interpret and enforce its own consent judgment in a dispute arising from an agreement with an arbitration clause, the Second Circuit's decision conflicts with the well-established rule that parties may forego arbitration rights. In this case, by agreeing to have the court retain jurisdiction to enforce the settlement agreement, the parties manifested an intention for judicial, rather than arbitral, enforcement of the settlement. *See Kokkonen*, 511 U.S. at 381 ("If the parties wish to provide for the court's enforcement of a dismissal-

producing settlement agreement, they can seek to do so.").

Moreover, the Second Circuit rule ignores the principle that "legal constraints external to the parties' agreement" may foreclose arbitration. *Mitsubishi Motors*, 473 U.S. at 628. In particular, "the Arbitration Act's mandate may be overridden by a contrary congressional command." *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1986). In cases where there is "an inherent conflict between arbitration and [another federal] statute's underlying purposes," *id.* at 227, arbitration should not be permitted. The Second Circuit rule, which *denies* federal courts the power to interpret and enforce their own judgments, inherently conflicts with the *duty* of federal courts to interpret and enforce their own judgments – a duty that the Second Circuit itself has recognized. *See Geller v. Branic Int'l Realty Corp.*, 212 F.3d 734, 737 (2d Cir. 2000) (stating that "when a district court 'so orders' a stipulated settlement, it does accept some obligations. The clearest obligation is a duty to enforce the stipulation that it has approved.").

This duty of federal courts to interpret and enforce their own judgments stems from the All Writs Act, 28 U.S.C. § 1651, which "makes plain that each federal court is the sole arbiter of how to protect its own judgments." *Y&A*, 38 F. 3d at 382-83. Under the All Writs Act, a federal court may "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of

jurisdiction otherwise obtained." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977). Thus, the Second Circuit rule denies powers that Congress has granted.

A federal court's obligation to interpret and enforce its own judgment also arises from the inherent equitable power of a federal court "to secure or preserve the fruits and advantages of a judgment or decree rendered." *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934). "Without this ability to enforce judgments rendered, 'the judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended.'" *U.S.I. Props. Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 496 (1st Cir. 2000) (quoting *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53 (1825)).

The Second Circuit's holding in this case is wrong. This Court should hear this case to reverse the Second Circuit's rule and endorse the majority view that federal courts must interpret and enforce their own prior judgments.

CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

App. 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONTINENTAL INSURANCE COMPANY,
Appellant,

v.

ALLIANZ INSURANCE COMPANY AND VIAD CORP,
Appellees.

No. 02-7438

2002 U.S. App. LEXIS 25879

December 16, 2002

Before Fred I. Parker, Chester J. Straub, and Barrington D. Parker, Jr., Circuit Judges.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said district court be and it hereby is AFFIRMED.

Plaintiff-appellant Continental Insurance Co. ("Continental") appeals from a judgment of the United States District Court for the Southern District of New York (John S. Martin, Jr., Judge), entered on April 18, 2002, denying Continental's motion for partial summary judgment and granting the motion of defendants-appellees Allianz

Insurance Co. ("Allianz") and Viad Corp. ("Viad") to stay the action and compel arbitration.

On September 30, 1975, Continental agreed to reinsure and assume all insurance and reinsurance risks written by Viad's then-wholly-owned subsidiary, General Fire & Casualty Company ("GF&C"). Viad agreed to reimburse Continental for the claim loss and expense incurred managing these GF&C claims until October 1, 1980.[1] The R&A Agreement contained an arbitration clause requiring the parties to refer to an arbitration panel "differences hereafter arising between the parties hereto with reference to any and all transactions or terms and conditions under this contract . . . ." (A. 42).

In 1983, Continental invoked the arbitration clause to recover from Viad for excess claim losses and expenses arising under the R&A Agreement. An arbitration panel ruled in favor of Continental in January 1984 and ordered Viad to pay a sum certain for reported claims through August 31, 1983. Viad failed to pay, prompting Continental to bring an action in the United States District Court for the Southern District of New York to confirm the arbitration award. The parties agreed to a "Stipulation and Order" pursuant to which Viad agreed to pay Continental the full amount of the arbitration award. Accompanying the Stipulation

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[1] Viad is successor-in-interest to Greyhound Corporation, the actual signatory to the R&A Agreement.

and Order were mutual releases releasing each party from any further claims, demands, suits, etc. "arising directly or indirectly out of the [R&A] Agreement . . . or the award of arbitrators . . . ." ("1984 Releases") (A. 115-16, 119-20). The 1984 Releases became effective upon Viad's payment. The district court, (Abraham Sofaer, Judge) "so ordered" the Stipulation and Viad paid as ordered. On March 24, 1984, each party received its 1984 Release.

The parties had no dealing with each other until the mid- to late 1990s. Allianz was named as a third-party defendant in several GF&C policy claims and tendered the defense to Continental. Maintaining that the 1984 Releases cancelled the R&A Agreement and extinguished any duty to defend purportedly arising thereunder, Continental brought an action on June 20, 2000 in the United States District Court for the Southern District of New York seeking, *inter alia*, injunctive and declaratory relief. Continental moved for partial summary judgment on September 18, 2000. Relying on the arbitration provision in the R&A Agreement, Allianz and Viad moved to compel arbitration on Continental's claims and to stay the federal action in the interim. The district court, (John S. Martin, Judge), denied Continental's motion, granted a stay, and compelled arbitration. Continental appeals.

Continental's principal argument is that the district court had the responsibility to enforce the "so ordered" 1984 Settlement Agreement, and did not do so. Defendants do not dispute that the district court had this responsibility, but argue that the district

court fulfilled this responsibility correctly by interpreting the 1984 Settlement Agreement as not having extinguished either the underlying obligations of the R&A Agreement, or the arbitration clause contained therein. We agree with defendants and the district court's interpretation of the 1984 Settlement Agreement, substantially for the reasons stated by the district court.

We find that the parties clearly entered into an arbitration agreement that remained valid and enforceable at all pertinent times. This is true even if, as Continental contends, the 1984 Releases cancelled the R&A Agreement because we find no express rescission of the arbitration provision. Absent an explicit intent to rescind, as the district court noted, the arbitration clause survived any termination of the R&A Agreement. *See WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 75 (2d Cir. 1997) ("The Guaranty does not mention the Agreement - much less its arbitration clause – and the Guaranty's provisions as to jurisdiction, venue, and waiver of moratorium and stay laws do not constitute the kind of clear and specific waiver required to defeat the express arbitration provision in the Agreement.").

Moreover, the arbitration clause can fairly be characterized as a "prototypical broad arbitration provision." *See Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (citation omitted); *see also Collins & Aikman Prod. Co. v. Building Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) ("The clause in this case, submitting to arbitration 'any claim or controversy arising out of or relating to the

agreement,' is the paradigm of a broad clause."). Continental does not dispute that its claims arise out of or are subject to terms of the R&A Agreement. (A. 8-12) Even if disputed, we find nothing in the record to rebut the strong presumption favoring arbitrability, given the breadth of the arbitration provision. *See WorldCrisa Corp.*, 129 F.3d at 74 (Broad clauses give rise to a "presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that [it] covers the asserted dispute.") (emphasis added) (quotation and citation omitted).

For these reasons, we find that the district court properly compelled arbitration. Pursuant to 9 U.S.C. § 3, then, a stay of proceedings pending arbitration was entirely appropriate. Finally, because a district court may not pass on the merits of any action when determining the threshold question of arbitrability of claims, *see AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986), the district court did not err when it denied Continental's summary judgment motion. Accordingly, the judgment of the district court denying Continental's motion for summary judgment and granting Allianz' and Viad's motions to compel and to stay is AFFIRMED.

App. 6

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CONTINENTAL INSURANCE COMPANY,
Plaintiff,

v.

ALLIANZ INSURANCE COMPANY AND VIAD CORP,
Defendants.

No. 00 Civ. 4548 (JSM)

2001 U.S. Dist. LEXIS 3191

March 23, 2001

Before John S. Martin, Jr., District Judge:

Continental Insurance Company ("Continental" or "Plaintiff") moves for partial summary judgment in this action against Allianz Insurance Company ("Allianz") and Viad Corporation ("Viad") (collectively "Defendants"). Defendants move to stay the action and compel arbitration. For the reasons set forth below, Plaintiff's motion is denied and Defendants' motion is granted.

BACKGROUND

In 1964, Greyhound Corporation (hereinafter referred to as "Viad," its successor-in-interest) purchased General Fire & Casualty Company

("GF&C") in order to provide automobile and general liability insurance coverage to Greyhound Lines, Inc. and other Greyhound affiliates. GF&C also wrote coverage for certain non-Greyhound entities. In 1975, Viad decided to sell GF&C. On September 30, 1975, Viad entered into a Reinsurance and Assumption Agreement ("R&A Agreement") with Continental. The R&A Agreement provided that Continental would reinsure the GF&C liabilities or "book of business," thereby converting GF&C into a "clean shell." Under the R&A Agreement, Continental assumed 100% of gross policy liability for GF&C and agreed to run off claims arising from policies issued by GF&C prior to September 30, 1975. In return, Viad transferred at least $20 million in GF&C assets to Continental which could be sold to satisfy GF&C claim reserve indebtedness. Viad further agreed to subsidize the sale of any GF&C assets that occurred below market value. The R&A Agreement contained a clause specifying arbitration as the method for resolving any disputes that arose under the Agreement. In 1976, Viad sold the GF&C "shell" to Allianz and agreed to indemnify Allianz for any claims made against it arising from the GF&C book of business.

In 1982, Continental initiated an arbitration proceeding against Viad concerning Viad's outstanding obligation after the run-off of the business. In January 1984, the arbitrators issued an Arbitration Award (the "Award" or the "1984 Arbitration Award") providing that:

> In payment of $ 5,340,250.00, the [Viad] Corporation shall be relieved of all liability whatsoever under the Reinsurance and Assumption Agreement assumed by Continental Insurance Company effective October 1, 1975, the Continental Insurance Company to be responsible for all liabilities arising from this agreement.

(Rizzo Dec. Ex. D at 2.)

On February 13, 1984, Continental filed an action in this Court to enforce the 1984 Arbitration Award and compel payment by Viad. The parties agreed to settle the case and exchange releases. On March 15, 1984, Judge Sofaer executed an order (the "1984 Stipulation and Order") closing the case as settled. The 1984 Stipulation and Order stated that on or before April 2, 1984: (1) Viad would transfer $ 5,340,250.00 to Continental in full satisfaction of all claims against Viad and GF&C, and (2) Continental, Viad, and GF&C would each deliver a release to the other party's attorney to be held in escrow that would "provide for the release of any and all claims arising directly or indirectly out of the Agreement or the Award, whether or not such claims were actually asserted in the arbitration proceeding resulting in the Award." (Novak Aff. Ex. 5). The 1984 Stipulation and Order further provided that if the funds were transferred on time, the attorneys would deliver the releases to their clients, and Continental would dismiss the action to enforce the 1984 Arbitration Award. If, on the other hand, the funds

were not delivered, the stipulation would be deemed to constitute consent by Viad to the entry of judgment against it in accordance with the Arbitration Award, and the attorneys would return the releases that were being held in escrow. The final paragraph of the 1984 Stipulation and Order included a reservation of rights by Viad in the event that Continental breached its obligations under the stipulation. In accordance with the 1984 Stipulation and Order, Continental, Viad and Allianz (as successor-in-interest to GF&C) executed reciprocal general releases on March 24, 1984 (the "1984 Releases").

In 1995, Continental merged with CNA, and the employees who worked for Continental left the company. Thereafter, several IBNR (incurred but not reported) claims were filed against Allianz and Viad for liabilities that allegedly arose under GF&C insurance policies written before 1975. Both Allianz and Viad have claimed a defense and sought indemnification from CNA under the R&A Agreement in these actions. On June 23, 1999, CNA accepted one such tender of defense from Allianz under a broad reservation of rights.

Sometime after June 23, 1999, CNA discovered the 1984 Releases. CNA asserts that the 1984 Releases, executed pursuant to the 1984 Stipulation and Order, extinguished the R&A Agreement and preclude Defendants' claims for defense and indemnification relating to the IBNR claims. Thus, Plaintiff brought this action seeking to enjoin Defendants from asserting any and all claims arising

under the R&A Agreement and seeking a declaration that by virtue of the 1984 Releases, it has no obligation to defend or indemnify Defendants in connection with claims arising under the R&A Agreement. Defendants contend that the 1984 Releases must be read in the context of the 1984 Arbitration Award, which required Viad to pay Continental more than $ 5,000,000 but also required Continental to retain all future liabilities for GF&C policies written before 1975. According to Defendants, the 1984 Releases were never intended to extinguish the R&A Agreement or Plaintiff's liability for the IBNR claims. Defendants therefore seek an order staying this action and compelling arbitration as required by the R&A Agreement's arbitration clause.

DISCUSSION

I. The Effect of the 1984 Stipulation and Order

Plaintiff attempts to boil this case down to the following argument: The 1984 Stipulation and Order extinguished all of Plaintiff's obligations under the R&A Agreement and thereby precluded all claims that Defendants seek to assert for defense and indemnification against Plaintiff. Based on this theory of the case, Plaintiff requests injunctive relief prohibiting Defendants from bringing any action to compel Plaintiff to honor its obligations under the R&A Agreement in order to protect the integrity of the 1984 Stipulation and Order. Unfortunately for Plaintiff, neither the law nor the facts support its position.

The All Writs Act, 28 U.S.C. § 1651, authorizes district courts to enjoin other lawsuits in certain special circumstances. *See MLE Realty Assoc. v. Handler*, 192 F.3d 259, 261 (2d Cir. 1999). However, this power is limited by the Anti-Injunction Act, which provides that federal courts may only enjoin state court proceedings when "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

Plaintiff's primary argument appears to be that the injunction that it seeks would protect and effectuate the 1984 Stipulation and Order, and therefore fits within the so-called "relitigation exception" to the Anti-Injunction Act. However, as the Supreme Court has explained, "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148, 108 S. Ct. 1684, 1690, 100 L. Ed. 2d 127 (1988). The relitigation exception is therefore narrower than the doctrine of res judicata. The Second Circuit Court of Appeals has interpreted *Chick Kam Choo* as preventing the relitigation exception from being used to protect the full res judicata effect of a federal court's judgment. *See Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 (2d Cir. 1989).

Judge Sofaer did not decide the issue of liability for the IBNR claims. The 1984 Stipulation and

Order does not, as Plaintiff argues, order the release of those claims. It also does not dismiss the case with prejudice. Rather, the Order closes the case as settled and describes the actions the parties have agreed to take, including the future exchange of releases and Continental's future consent to dismiss the case. Therefore, the relitigation exception to the Anti-Injunction Act does not apply to this case because the relevant issue was not determined by a federal court. The 1984 Stipulation and Order also does not preclude Defendants from bringing future actions for claims under the R&A Agreement in federal court. Plaintiff's request for an order enjoining any further proceedings regarding the liability for the IBNR claims is therefore denied.

II. The Effect of the Releases

Plaintiff also asserts that the 1984 Releases extinguished both its liability for the IBNR claims and the R&A Agreement itself. Defendants respond that the 1984 Releases should be read in conjunction with the 1984 Arbitration Award, and that they extinguish neither Plaintiff's liability for the claims at issue nor the R&A Agreement. Defendants further argue that because the R&A Agreement is still in effect, the present dispute must proceed to arbitration as set forth in the R&A Agreement's arbitration clause.

The language of the 1984 Releases is extremely broad. Indeed, Defendants signed a document releasing Plaintiff from:

> all claims, actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands, in law or equity, arising directly or indirectly out of the Reinsurance and Assumption Agreement dated October 1, 1975, or the award of arbitrators, entered pursuant to said agreement on or about January 18, 1984 (whether or not such claims, actions, causes of action, etc., were actually asserted in the arbitration proceeding which resulted in the aforesaid award).

(Rizzo Decl. Ex. F.)

Plaintiff argues that this broad language terminates all of its obligations under the R&A Agreement and therefore extinguishes the entire Agreement, including its arbitration clause.

The question of the termination of the arbitration clause in the R&A Agreement is one for the Court to decide. *See Peerless Importers, Inc. v. Wine, Liquor & Distillery Workers Union Local One*, 903 F.2d 924, 929 (2d Cir. 1990). Because federal courts are required to honor arbitration clauses whenever possible, arbitration should be compelled unless the parties' agreements can only be

interpreted as canceling the arbitration clause. *See Vogel v. Superior Propane, Inc.*, 1993 U.S. Dist. LEXIS 12246, No. 93 civ. 5557, 1993 WL 350041, at *3 (S.D.N.Y. Sept. 3, 1993) (citing *In re Chung and President Enters.*, 943 F.2d 225, 230 (2d Cir. 1991); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 250-51 (2d Cir. 1991); *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 522 (2d Cir. 1980)); *see also Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302, 2001 U.S. LEXIS 2459, 2001 WL 273205, at *10 (U.S. 2001) (recognizing the benefits of arbitration agreements). Thus, determination of the effect of the 1984 Releases on the liability for the IBNR claims in this action is appropriate only if those Releases extinguished the R&A Agreement and its arbitration clause.

Plaintiff contends that the clear language of the Releases must be accepted as an indication of the intent of the parties to extinguish the R&A Agreement. *See Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2d Cir. 2000). However, common sense does not support the theory that Defendants transferred $5,340,250.00 to Plaintiff, the amount specified in the 1984 Arbitration Award, while simultaneously releasing Plaintiff from all obligations for the liabilities it assumed under the R&A Agreement, which were confirmed in the same Award. Plaintiff's counsel suggested at oral argument that something must have happened to lead to the signing of such a release, but this mystery need not be solved by this Court because the

plain language of the release does not extinguish the R&A Agreement.

A general release can terminate substantive rights under an original contract, but it does not necessarily nullify all procedural provisions of the contract. *See Schlaifer v. Sedlow*, 51 N.Y.2d 181, 412 N.E.2d 1294, 1296, 433 N.Y.S.2d 67 (1980). Under New York law,[1] "once the parties to a broad arbitration clause have made a valid choice of forum, as here, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator." *Id.* Plaintiff argues that the combined effect of the 1984 Releases and Stipulation and Order serves to cancel the R&A Agreement. However, Plaintiff's own plain-language argument cuts against this assertion. If the parties had wished to extinguish the R&A Agreement and its arbitration clause, they could have clearly and unambiguously used language to that effect.

In fact, the 1984 Stipulation and Order itself does not support Plaintiff's position. It provided that if Viad did not transfer the settlement funds, the Court would enter a judgment against Viad enforcing the 1984 Arbitration Award and the releases would not be exchanged. Thus, it was only because Viad honored its obligations under the 1984

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[1] The parties agree that New York law is applicable to the interpretation of the relevant documents.

Stipulation and Order by transferring funds in an amount determined by the arbitrators that Plaintiff came to possess the 1984 Releases. It defies logic to suggest that Viad intended to release Plaintiff from all of its obligations under the R&A Agreement and 1984 Arbitration Award when it agreed to pay the amount of money specified in the 1984 Arbitration Award as completing its obligations under the R&A Agreement.

In addition, Defendants allege that Plaintiff accepted responsibility for the liabilities it assumed under the R&A Agreement for eleven years after the 1984 Releases were exchanged (Novak Decl. P 11), further indicating that the R&A Agreement was not extinguished. *See IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.*, 26 F.3d 370, 374 (2d Cir. 1994) ("The practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.") (citation omitted). Plaintiff can neither admit nor deny that it continued to honor its obligations under the R&A Agreement, presumably because of the merger with CNA. Even without actual proof that Plaintiff was accepting responsibility for IBNR claims for eleven years after the 1984 Releases, Plaintiff's argument must fail. Neither the plain language nor the most likely interpretation of the parties' intent support the theory that the 1984 Releases and Stipulation and Order cancelled the R&A Agreement. Therefore, the arbitration clause requires that the effect of the 1984 Releases on the

liability for the IBNR claims must be decided by an arbitrator.

CONCLUSION

For the reasons set forth above, Plaintiff's motion for partial summary judgment is denied and Defendants' motion to compel arbitration is granted.

SO ORDERED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE CONTINENTAL INSURANCE COMPANY,
Petitioner,

v.

THE GREYHOUND CORPORATION,
Respondent.

1984 Civil Action No. 1056 (ADS)

March 14, 1984

STIPULATION AND ORDER

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the parties' undersigned counsel that:

1. The application of The Continental Insurance Company ("Continental") for an order granting judgment pursuant to 9 U.S.C. § 9, is adjourned from March 14, 1984, to April 6, 1984.

2. On or before April 2, 1984, The Greyhound Corporation ("Greyhound") will cause to be transferred by wire the sum of $5,340,250.00 to a bank account designated by Continental, in full satisfaction of all claims of Continental and of Continental's subsidiary, Underwriters Adjusting Company ("UAC"), against Greyhound and the

General Fire and Casualty Company ("GF&C") arising out of the Reinsurance and Assumption Agreement, dated October 1, 1975 (the "Agreement"), or the arbitrators' award dated January 18, 1984 (the "Award"), a copy of which appears as Exhibit D to Continental's verified petition in this action, sworn to on February 13, 1984.

3. On or before April 2, 1984, Greyhound will deliver to Miller, Singer, Michaelson & Raives, P.C. ("Miller, Singer") releases by Greyhound and by GF&C in favor of Continental and UAC, and Continental will deliver to Rogers & Wells, counsel for Greyhound, releases by Continental and by UAC in factor of Greyhound and GF&C. Said releases shall provide for the release of any and all claims against Greyhound and GF&C, in the case of the Continental and UAC releases, and against Continental and UAC, in the case of the Greyhound and GF&C releases, arising directly or indirectly out of the Agreement or the Award, whether or not such claims were actually asserted in the arbitration proceeding resulting in the Award. Said releases will be held in escrow by Rogers & Wells and Miller, Singer, pursuant to paragraphs 4 and 5, as the case may be.

4. In the event the funds are transferred to Continental in accordance with the requirements of paragraph 2 hereinabove, (a) Miller, Singer and Rogers & Wells will deliver the aforesaid general releases to their respective clients on April 2, 1984; and (b) Continental will promptly take all steps

necessary to dismiss this action (including the application referred to in paragraph 1, hereinabove), with prejudice and without costs to either party;

5. In the event Greyhound does not transfer the funds in accordance with the requirements of paragraph 2 hereinabove, this stipulation shall be deemed to constitute consent by Greyhound to the entry by this Court of judgment against Greyhound in accordance with the Award. Further, Miller, Singer and Rogers & Wells will return to each other the releases referred to in paragraph 3 hereinabove.

6. Greyhound reserves its rights against Continental and UAC, in the event Continental or UAC breaches its obligations under this stipulation, including its right to contest the enforceability of the Award.

Dated: New York, New York
March 14, 1984

ROGERS & WELLS

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MILLER, SINGER,
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By: /s/ Lawrence I. Brandes
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SO ORDERED: 3/15/84

/s/ Abraham D. Sofaer
U.S.D.J.

[By hand:] This case is hereby ordered closed, as settled, and the parties may reopen for up to 30 days from this order for any reason.

So ordered.

/s/ Abraham D. Sofaer
U.S.D.J.